SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 99

THE UNITED STATES, APPELLANT

vs.

JEFFERSON F. MOSER

APPEAL FROM THE COURT OF CLAIMS

INDEX

1 In the Court of Claims

JEFFERSON F. MOSER
v.
THE UNITED STATES
No. B–125

I. *Petition*

Filed June 22, 1922

To the Honorable the Court of Claims:

The claimant, Jefferson F. Moser, respectfully represents:

I. He entered the United States Navy as a midshipman at the Naval Academy on September 29, 1864, and served during the Civil War, and was promoted to ensign on April 19, 1869. He remained in said service, and by successive promotions in all intervening grades he reached the grade of captain on August 10, 1903, in which grade he served until retired on September 29, 1904. He had a creditable record throughout his entire service.

He was retired on September 29, 1904, under section 1443 of the Revised Statutes. Since that date he was first paid as a captain in the Navy on the retired list at the rate of $3,375, but afterwards, by the judgment of this honorable court, as hereinafter set forth, received the pay of a rear admiral of the lower half on the retired list to and including December 31, 1906, at the rate of $4,000 a year. Since December 31, 1906, he was at first paid only as a captain on the retired list of the Navy. First, at the same rate of $3,375 a year up to including May 12, 1908, and from and after the date of the act of May 13, 1908, increasing the pay of the Navy (35
2 Stat. 127) at the rate of pay provided by that act for a captain on the retired list of the Navy, to wit, $3,750, until April 8, 1917, upon which date he reported under orders dated April 6, 1917, for active duty in time of war at the United States naval training station, San Francisco, California; and continued on such active duty, first at the U. S. naval training station at San Francisco, and afterwards with the commandant of the 12th naval district, until June 15, 1919, when he was detached from all active duty. From and after said 8th day of April, 1917, to June 15, 1919, he has been paid the full active duty pay of a captain of more than twenty years' service in the Navy, or at the rate of $5,000 a year; whereas he should have received the full active duty pay of a rear admiral of the lower half, on shore duty, amounting to $6,000 a year.

II. On the 13th day of September, 1905, the claimant filed his petition in this court, No. 28445, claiming the pay of a rear admiral on the retired list under and in accordance with section 11 of the act of March 3, 1899 (30 Stat. 1007), the only act then in existence

relating to the retirement of officers of the Navy having Civil War service, which section is as follows:

"That any officer of the Navy with a creditable record who served during the Civil War shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

The cause came on to be heard before this honorable court on said petition, and such proceedings were had that on the 4th day of February, 1907, this court entered judgment in his favor for the sum of $2,537.50, as will appear by inspection of the records of this court. No appeal was ever taken from said judgment, and said judgment was reported to Congress in accordance with law, appro-

3 priated for, and paid.

III. In the adjudication and decision of said cause, there was necessarily involved and decided, that by force of said 11th section of the act of March 3, 1899, the claimant had attained the rank of the next higher grade, to wit, that of rear admiral, without which rank he could not have become entitled to the pay thereof. The adjudication, so made by this honorable court, constitutes a conclusive and binding determination of the rate of pay to which he is entitled, and estops the United States from contesting his right and title to the pay of a rear admiral on the retired list of the Navy.

IV. On the 6th day of March, 1912, the claimant filed another petition in this court, No. 31497, and afterwards, in the same cause filed an amended petition claiming the difference between pay as captain on the retired list of the Navy from January 1, 1907, to February 9, 1914; and this court, February 9, 1914, gave judgment in his favor for the amount of such difference amounting to $5,843.73. From this judgment an appeal was duly taken to the Supreme Court of the United States, but before said appeal came on for hearing, the United States did, on the 17th of December, 1915, move said Supreme Court to dismiss said appeal, and the same was thereupon dismissed; whereby the judgment rendered in favor of the claimant became final, was reported to Congress in accordance with law, appropriated for, and paid.

V. On the 13th of March, 1918, the claimant filed a third petition in this court, No. 33954, claiming the difference between the pay of a captain on the retired list of the Navy and a rear admiral of the lower half on the retired list from February 9, 1914, to Decem-

4 ber 31, 1917, during part of which time the claimant was in an inactive status and in the receipt of the pay of a captain on the retired list at the rate of $3,750 a year, and during a part of which time the country was in a state of war he was on active duty and was paid as a captain on the active list at the rate of $5,000 a year. He claimed the difference between those two rates of pay and the pay of a rear admiral of the lower half on the retired list on inactive duty, to wit, $4,500 a year, and while on active duty the full active duty pay of a rear admiral on the active list at the rate

of $6,000, which difference in pay amounted to $3,101.38, for which amount judgment was entered.

From this judgment no appeal was taken to the Supreme Court of the United States and it was reported to Congress in accordance with law, appropriated for, and paid. Reference is hereby made to the full text of the decisions of this court, the first two being accompanied by opinions reported, respectively, in vols. 42 C. Cls. 86–94 and 49 C. Cls. 285–294, and in the last of which the judgment alone is reported in 53 C. Cls. 639. A copy of the findings of fact and conclusion of law and memorandum opinion accompanying said judgment is annexed as an exhibit to this petition.

VI. The claimant hereby claims the difference between pay at the rate of $5,000 a year as a captain on active duty and $6,000, the legal rate of pay of a retired rear admiral of the lower half on active duty, from January 1, 1918, to June 15, 1919, upon which date he was detached from all active duty and ordered to his home; and from and after that date until the date of the rendition of a judgment in this case, the difference between $3,750 a year, the pay of a captain on the retired list of the Navy, and $4,500, the legal rate of pay of a retired rear admiral of the lower half.

5–6 VII. This claim is made under and depends upon the following among other provisions of statute:

Navy personnel act of March 3, 1899 (30 Stat. 1007) and the act of May 13, 1908 (35 Stat. 127) fixing the rates of pay of captains and rear admirals of the Navy.

Revised Statutes, sections 1462 and 1592, and other provisions referred to and construed by the Comptroller of the Treasury in decision dated April 30, 1917 (23 Comp. Dec. 603, Memo. Bur. S. & A. vol. 7, p. 4232), providing that officers on the retired list of the Navy employed on active duty in time of war shall receive the full pay of their respective grades.

No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims five thousand dollars ($5,000).

KING & KING,
Attorneys for Claimant.

[Jurat showing the foregoing was duly sworn to by George A. King. Omitted in printing.]

7 *Exhibit to petition*

Court of Claims of the United States

No. 33954

Jefferson F. Moser *v.* The United States

This case having been heard by the Court of Claims, the cou upon the evidence makes the following:

FINDINGS OF FACT

I. Jefferson F. Moser, the plaintiff herein, on February 4, 190 recovered judgment in this court against the United States fo $2,537.50, in accordance with the findings of fact, conclusion of la and opinion of the court (42 C. Cls. 86). Said judgment was neve appealed from and was paid by the Treasury. According to th terms of said findings of fact, conclusion of law, and opinion th plaintiff was entitled to have been retired as a rear admiral, lowe nine, with a salary at the rate of $4,500 per annum, and the increa of pay allowed him by said judgment was for the period up t and including the 31st day of December, 1906.

II. The plaintiff brought a second suit in this court for salary a a rear admiral of the lower nine from January 1, 1907, to Februar 9, 1914, and judgment was rendered in his favor February 9, 191 in the sum of $5,843.73, as will appear by reference to the offici report of the case, 49 C. Cls. 285, 294.

The plaintiff has continued since the 9th day of February, 191 to be an officer on the retired list of the Navy and has been pai $3,750 per annum to April 7, 1917, which is the rate allowed by la for a captain on the retired list while not on active duty. O April 6, 1917, plaintiff was ordered into active service an

8 since that date has so served and has been paid $5,000 pe annum, which is the rate allowed by law for a captain on th retired list while on active duty in time of war.

III. Plaintiff's salary as a rear admiral would have been at th rate of $4,500 a year while not on active duty and at the rate o $6,000 a year while in the performance of active duty in time o war. The difference between those two rates of pay would amou from the 10th of February, 1914, to the 31st of December, 1917, t $3,101.38.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a co clusion of law that plaintiff is entitled to recover the sum of $3,101.3 as shown by Finding III. It is therefore ordered and adjudged b the court that the plaintiff recover of and from the United State the sum of $3,101.38.

Memorandum

This case is decided upon the authority of Moser *v.* United States, 42 C. Cls. 86, and Moser *v.* United States, 49 C. Cls. 285. In the latter case the defendants having taken an appeal to the Supreme Court before said appeal came on to be heard voluntarily dismissed the same.

June 3, 1918.

9 II. *General traverse*

Filed Aug. 22, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *Argument and submission of case*

On March 7, 1923, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Mr. John G. Ewing, for the defendant.

10 IV. *Findings of fact, conclusion of law, and opinion of the court by Hay, J.*

Entered March 19, 1923.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Jefferson F. Moser, the plaintiff herein, on February 4, 1907, recovered judgment in this court against the United States for $2,537.50, in accordance with the findings of fact, conclusion of law, and opinion of the court. (42 C. Cls. 86.) Said judgment was never appealed from and was paid by the Treasury. According to the terms of said findings of fact, conclusions of law, and opinion the plaintiff was entitled to have been retired as a rear admiral, lower half, with a salary at the rate of $4,500 per annum, and the increase of pay allowed him by said judgment was for the period up to and including the 31st day of December, 1906.

II.

The plaintiff brought a second suit in this court for salary as a rear admiral of the lower half from January 1, 1907, to February 9, 1914, and judgment was rendered in his favor February 9, 1914, in

the sum of $5,843.73, as will appear by reference to the official report of the case. (49 C. Cls. 285, 294.)

The plaintiff continued since the 9th day of February, 1914, to be an officer on the retired list of the Navy and was paid $3,750 per annum to April 7, 1917, which is the rate allowed by law for a captain on the retired list while not on active duty. On April 6, 1917, plaintiff was ordered into active service and since that date has so served and been paid $5,000 per annum which is the rate allowed by law for a captain on the retired list while on active duty in time of war.

III.

Plaintiff's salary as a rear admiral would have been at the rate of $4,500 a year while not on active duty and at the rate of $6,000 a year while in the performance of active duty in time of war. The difference between those two rates of pay would amount from the 10th of February, 1914, to the 31st of December, 1917, to $3,101.38, for which amount this court entered judgment in his favor in the third suit, No. 33954, from which judgment no appeal was taken and the same was paid.

11 IV.

From January 1, 1918, the plaintiff continued on active duty until June 15, 1919. From June 16, 1919, he reverted to an inactive status in which he still remains.

There would be due the claimant if held entitled to the difference in pay between the rank of captain after twenty years, and that of rear admiral of the lower half on the retired list of the Navy while on active duty from June 16, 1919, to March 15, 1923, the sum of $4,270.83.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of $4,270.83 the amount due him on March 15, 1923. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of four thousand two hundred and seventy dollars and eighty three cents ($4,270.83).

OPINION.

HAY, Judge, delivered the opinion of the court:

This case is decided upon the authority of Moser v. United States, 42 C. Cls. 86, and Moser v. United States, 49 C. Cls. 285, and the case of Moser v. United States, 53 C. Cls. 639. In the case reported in 49 C. Cls. 285 the defendant took an appeal to the Supreme Court of the United States, but before the appeal came on to be heard the United States dismissed the same.

This court in this case has had its attention called to the case of Jasper v. United States, 43 C. Cls. 368, which case was decided

after the case of Moser v. United States, 42 C. Cls. 86, and before the decision of the case of Moser v. United States, 49 C. Cls. 285. In the Jasper case the Government relied upon the act of June 29, 1906, 34 Stat. 554, and the court decided that the plaintiff Jasper was not entitled to recover, thereby reversing the first Moser case. When, however, the court came to consider the second Moser case, 49 C. Cls. 285, it reaffirmed the first Moser case, and decided that the questions involved were res judicata. That case was followed by the third Moser case, 53 C. Cls. 639, reaffirming the first and second Moser cases upon the ground of res judicata; and we see no reason for changing our views as to the case at bar, which involves the same questions decided in the former three Moser cases.

While the Jasper case does reverse the first Moser case, yet this court is not infallible, and it may have been wrong in its then construction of the act of June 29, 1906, supra. It was urged in the Jasper case by able counsel that the act of June 29, 1906, did not affect the rights of the plaintiff in that case, and after a careful consideration of that act we are of opinion that the provisions of the statute do not affect the rights of the plaintiff in this case. The rank and pay of retired officers becomes fixed upon their retirement. The plaintiff was retired under the act of March 3, 1899, 30 Stat. 1007, and under that act the court held that service as a cadet constituted service during the Civil War within the
12 meaning of that act. The act of June 29, 1906, in terms provided that service as a cadet should not be accounted service during the Civil War in the application of the act of March 3, 1899, but there was a proviso attached to the act of June 29, 1906, which reads as follows: "*Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress." This proviso was manifestly intended for the benefit of officers who were on the retired list at the date of the passage of this act. The plaintiff was on the retired list then, and had been for some years, and had received at the date of his retirement an advance of grade, and therefore the provisions of the act did not then and do not now apply to him.

For the reasons above stated we are of the opinion that the plaintiff is entitled to recover. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

13 V. *Judgment of the court*

At a Court of Claims held in the city of Washington on the nineteenth day of March, A. D. 1923, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff,

as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of four thousand two hundred and seventy dollars and eighty-three cents ($4,270.83).

By the Court.

VI. *Defendant's application for appeal*

From the judgment rendered in the above-entitled cause on the 19th day of March, 1923, in favor of claimant, the defendant, by its Attorney General, on the 11th day of June, 1923, makes application for, and gives notice of, and appeal to the Supreme Court of United States.

Robert H. Lovett,
Assistant Attorney General.

Filed June 11, 1923.

VII. *Order of court allowing appeal*

It is ordered by the court that the defendant's application for appeal be and the same is allowed.

Entered June 18, 1923.

14 Court of Claims of the United States

Jefferson F. Moser vs. The United States

No. B–125

Clerk's certificate

Filed June 21, 1923

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the defendant's application for an appeal to the Supreme Court of the United States; of the order of court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this twenty-first day of June, A. D. 1923.

[seal.]

F. C. Kleinschmidt,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 29707. Court of Claims. Term No. 99. The United States, appellant, vs. Jefferson F. Moser. Filed June 26th, 1923. File No. 29707.

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AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
JEFFERSON F. MOSER, APPELLEE } No. 99

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Jefferson F. Moser on September 29, 1904, while serving in the grade of captain, United States Navy, was placed on the retired list after forty years of service in accordance with Section 1443, Revised Statutes. The letter notifying him of his retirement is set out in the Findings of Fact in the case of *Jefferson F. Moser* v. *United States* (42 C. Cls. 87), as follows:

> NAVY DEPARTMENT,
> *Washington, May 17, 1904.*
>
> SIR: The President of the United States having approved your application for retirement, you are, by his direction, transferred to the retired list of officers of the Navy from September 29, 1904, in accordance with the

provisions of section 1443 of the Revised Statutes of the United States.

Very respectfully,

CHAS. H. DARLING,
Acting Secretary.

Captain JEFFERSON F. MOSER, *U. S. Navy,*
Commandant Naval Training Station,
San Francisco, Calif.

The court below held in said case that during his entire service the record of Moser was creditable. At the date of his retirement Moser was retired as of the rank of captain, and he has been so held on the rolls of the United States Navy ever since said date. Moser on February 4, 1907, recovered judgment in the Court of Claims against the United States for the sum of $2,537.50. (42 C. Cls. 86.) The court found in said case as follows (p. 88):

> The ultimate fact, so far as it is a question of fact, that the claimant's service as a midshipman in the Naval Academy from September 29, 1864, to the close of the War of the Rebellion was creditable service "during the civil war."

The court below therefore held that Moser when placed on the retired list was entitled to have been retired as a rear admiral, lower half, with a salary at the rate of $4,500 per annum, and the difference of pay allowed him by the judgment of said court was for the period up to and including the 31st day of December, 1906. Moser brought a second suit in the court below for difference in pay of rear admiral of the lower half and of captain from January 1,

1907, to February 9, 1914, and judgment was rendered in his favor February 9, 1914, in the sum of $5,843.73. (See 49 C. Cls. 285.)

Moser continued since the 9th day of February, 1914, to be rated as a captain on the retired list of the Navy, and he was recalled to active duty as captain on April 6, 1917, and continued on active duty until relieved and detached on June 15, 1919. He then reverted to an inactive status as retired captain in the United States Navy. Moser brought a third suit in the court below for difference in pay as a rear admiral of the lower half and as a captain from February 9, 1914, to December 31, 1917. He recovered judgment in the court below on June 3, 1918, in the sum of $3,101.38. (See 53 C. C. 639.)

Moser then brought suit against the United States in the Court of Claims by petition filed June 22, 1922, reciting and setting out the preceding actions and claiming judgment for the difference in pay as a rear admiral of the lower half and as a captain from January 1, 1918, to March 15, 1923. His claim was based on Section 11 of the Act of March 3, 1899 (30 Stat. 1007), which section reads as follows:

> Any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.

The court below on March 19, 1923, gave judgment for Moser for the difference in pay up to March 15, 1923, in the sum of $4,270.83.

The court in so rendering judgment based it on the following reason (R. 6, 7):

> This case is decided upon the authority of *Moser* v. *United States*, 42 C. Cls. 86, and *Moser* v. *United States*, 49 C. Cls. 285, and the case of *Moser* v. *United States*, 53 C. Cls. 639. * * * When, however, the court came to consider the second Moser case, 49 C. Cls. 285, it reaffirmed the first Moser case, and decided that the questions involved were *res judicata*. That case was followed by the third Moser case, 53 C. Cls. 639, reaffirming the first and second Moser cases upon the ground of *res judicata;* and we see no reason for changing our views as to the case at bar, which involves the same questions decided in the former three Moser cases.

The court below then set down the following additional reason for giving judgment in favor of Moser (R. 7):

> The plaintiff was retired under the act of March 3, 1899, 30 Stat. 1007, and under that act the court held that service as a cadet constituted service during the Civil War within the meaning of that act. The act of June 29, 1906, in terms provided that service as a cadet should not be accounted service during the Civil War in the application of the act of March 3, 1899, but there was a proviso attached to the act of June 29, 1906, which reads as follows: "*Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the

Navy and placed on the retired list by virtue of the provisions of a special act of Congress." This proviso was manifestly intended for the benefit of officers who were on the retired list at the date of the passage of this act. The plaintiff was on the retired list then, and had been for some years, and had received at the date of his retirement an advance of grade, and therefore the provisions of the act did not then and do not now apply to him.

ASSIGNMENTS OF ERROR

First. The court erred in holding that the questions involved in this case were *res judicata*.

Second. The court erred in holding that service as a cadet during the Civil War prior to April 9, 1865, entitled Moser to be retired with the rank and pay of a rear admiral of the lower half for the reason that Moser "had received at the date of his retirement an advance of grade," and therefore the provisions of the Act of June 29, 1906, did not then and do not now apply to him.

ARGUMENT

I

The court below erred in holding that the questions involved in this case were *res judicata*

The question that was raised in the first action brought by Moser, in which judgment was recovered on January 4, 1907, was whether he was entitled, under the provisions of Section 11 of the Act of March 3, 1899 (30 Stat. 1007), known as the Navy

Personnel Act, to have been retired with the rank and consequent pay of a rear admiral of the lower half, as said section provided:

> That any officer of the Navy, with a creditable record, who served during the Civil War shall, when retired, be retired with the rank and three-fourths of the sea pay of the next higher grade.

Moser, being a captain at the time of his retirement, contended that he was entitled to be retired with the rank and retired pay of the next higher grade—that of rear admiral of the lower half. This upon the ground that he had a creditable record and had served during the Civil War. The court below held in that case that under the said provision and under the facts, undisputed, of the record of the claimant, he was entitled to be so retired as a rear admiral and gave him judgment for the difference in pay.

On April 20, 1908 (43 C. C. 368), there was decided by the Court of Claims the case of *Jasper* v. *The United States*. Jasper was in a similar situation to Moser, and the court, after full consideration of the law as applicable to the facts of the case, rendered a judgment of dismissal against Jasper. There was called to the attention of the court below a statute which had been enacted on June 29, 1906 (34 Stat. 554), in the following words:

> That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular

> or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the Official Register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided,* That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress.

In the opinion of the court below it is stated that neither in the case of Moser or the original case of Jasper, when under consideration, was the court's attention called to this statute, and no reference was made thereto; that if the statute had been brought to the attention of the court when the original Moser case was considered the court would not, in the face of that statute, have given judgment for the claimant.

When Moser brought his second action against the United States the defense was set up against his claim of the provision of the Act of June 29, 1906 (34 Stat. 554). On consideration of the argument then made the court held that the judgment

given in the first case of *Moser* v. *The United States* (42 C. Cls. 86) should be reaffirmed and followed. The court held since the questions involved in the second case were similar to those involved in the first and, therefore, the matters in entire controversy were *res judicata*, judgment should be given in favor of Moser.

In the determination of the second case brought by Moser (49 C. Cls. 285, 290–292), Judge Barney, delivering the opinion of the court, said:

> At the time this former *Moser case* was presented to the court neither one of the parties called the attention of the court to the provision of the Act of June 29, 1906 (34 Stat. 554). * * *.
>
> In fact, the court and the attorneys engaged in that case were at that time ignorant of the existence of that statute.
>
> A little more than a year after the trial of the former *Moser case* the case of *Jasper* v. *United States* (43 C. Cls. 368) came before this court, in which the same question was involved, and in that case attention, was called to the act of June 29, 1906. It was considered and construed and this court decided that it deprived Jasper of the right to reckon service at the Naval Academy during the "Civil War" as "service during the Civil War" within the meaning of section 11 of the act of March 3, 1899, *supra*. This reversed the ruling of the court in the former *Moser case*, and the court remarked in its opinion that if the provisions of the

act of June 29, 1906, had been called to the attention of the court the result would have been the same in both cases.

It will thus be seen that the question is presented to the court in this case whether the decision and judgment in the former *Moser case* (42 C. Cls. 86) is *res judicata* as to the claimant's status as to pay as a retired naval officer.

* * * * *

If we admit that this court was in error in the former *Moser case* in the construction of the statute then in force as to the retired pay of officers (and that is, at least, somewhat doubtful), this error as affecting the rule of *res judicata* would not differ from an error as to any rule of the common law. Where the law of a case is settled by adjudication it is settled as to statute law as well as the common law. When a suit has been tried in a court of competent jurisdiction it is a legal presumption amounting to a conclusion that every issue of law involved in it has been tried and decided.

Appellant respectfully represents to the court that the application of the principle of *res judicata* to the circumstances of the first *Moser case*, and on which principle judgment was rendered for Moser in the succeeding cases, including the present case, is erroneous.

(1) In the case of *Board of Commissioners of Lake County, Colorado* v. *Sutliff*, determined in the Circuit Court of Appeals of the Eighth Circuit (97 Fed.

Rep. 270), the consideration of the question as to when an earlier judgment can act as an estoppel on the principle of *res judicata*, is clearly and forcibly set out. The action was on coupons of municipal bonds issued by the Board of Commissioners of said Lake County. It was held by the court that an action on coupons from municipal bonds is not upon the same cause of action as a former action on different coupons from the same bonds, and hence the judgment in the first action renders *res judicata* in the second only such issues as were actually raised, litigated and determined in the first suit. The language of Judge Sanborn in the decision of said action clearly determines the conditions on which the principle of *res judicata* is to be applied. He says (pp. 273–274):

> There are two grounds on which an earlier judgment in an action between the same parties may constitute a conclusive estoppel respecting the issue in a subsequent suit. The first ground is that the later suit is founded upon the same causes of action upon which the former action was based. In a case where this is the fact, the former judgment is conclusive in the subsequent litigation, not only of every issue which was raised and determined, but also of every question which might have been presented by either party and might have been determined by the Court in that suit. The second ground is that the subsequent action is founded on different causes of action, but that the issues which it presents were actually raised, litigated and determined

> in the earlier suit. In a case in which the second action is upon different causes of action from those involved in the first, the former judgment, though between the same parties, operates as an estoppel only as to the points and questions actually litigated and determined and it leaves the parties free to contest and try *de novo* every issue and controversy which might have been, but which was not in fact, litigated and decided in the earlier action.

While the parties and the subject matter in this case are identical with those in the three former cases of Moser, the cause of action is not identical. All that the court below could pass upon and determine is the question as to whether the appellee was entitled to a money judgment against the United States. The sole question in dispute in the preceding actions of Moser was whether the claimant was entitled to a judgment for difference in pay for certain specific periods. He now claims that he was entitled to be credited with an additional amount and the court below gave judgment for said difference in pay from January 1, 1918, to March 15, 1923. The pay of Moser during this period gave rise to a distinct claim to said payment as against the United States, which claim differs from the claims adjudicated and passed upon in the preceding Moser cases. The failure of the United States to allow Moser the payment he claimed gave rise to a distinct cause of action at each successive period when said pay, in the opinion of Moser, was due and was not received. The said causes of action are separate and distinct and Moser

can not here contend that the question as to whether he was entitled to said pay at any period since January 1, 1918, is *res judicata*, since the court below has never pronounced upon the merits of said question.

In *Dennison* v. *United States* (168 U. S. 241), which was an action by a supervisor for fees and disbursements, plea of *res judicata* was made that in a former suit for items of service of the same nature and description as those claimed in this case, the Court found in claimant's favor. The Court said (p. 249):

> * * * The suit under consideration is not for the *same* items as those allowed in the former case, but for *similar* items, and the case falls within our ruling in *Cromwell* v. *County of Sac* (94 U. S. 351), that "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." There was no issue raised and decided in the former case as to the legality of the several items considered separately, but such issue is clearly raised in this case.

Cromwell v. *County of Sac* (94 U. S. 351) was an action on four bonds and attached coupons. To defeat the action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action upon certain earlier maturing coupons which were the property of the same owner and presented for his sole use and benefit.

The Court said (pp. 352, 353):

> In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every

ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the claim or demand in controversy. Such demand or claim having passed into judgment can not again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the injury must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

(2) The court below, in the decision in the second *Moser case*, which has been followed in the subsequent cases, in effect held that it could not consider in a subsequent suit an express statutory enactment which was confessedly overlooked in the former suit because "when a suit has been tried in a court of competent jurisdiction it is a legal presumption amounting to a conclusion that every issue of law involved in it has been tried and decided." And yet

the court below, both in the decision of the *Jasper case* and in the decision of the second *Moser case*, specifically stated that the consideration of the statute of June 29, 1906, was never before the court and that the court was in absolute and utter ignorance of the existence of such statute when the first *Moser case* was decided. In the subsequent cases brought by Moser the court held, however, that the original *Moser case* was *res judicata*, and would not consider the effect of this statute as a good and sufficient bar and defense to the renewed claims made by Moser. In other words, the court below practically assumed the position that there was a legal presumption, amounting to a conclusion, that every issue in law had been tried in the first *Moser case* and, therefore, that this statute had been considered by the court. Yet, at the same time, the court twice in written opinion declares that said statute never was considered by it. The contradiction is evident. Bigelow on Estoppel (p. 112) states:

> But though verdict estoppels apply in a different as well as in the same cause of action, it must not be supposed that the parties would be estopped by a judgment in one cause of action from disputing, in another cause of action, the doctrines of law applied in the first. The facts decided in the first suit can not be disputed, and for the purpose of the conclusiveness of those facts, but no further, the law applied must be accepted. Thus, if a decree in a suit to declare

> a mortgage invalid proceed upon the constitutionality of a statute, the parties can not afterwards deny the validity of the statute in question when the mortgagee attempts to foreclose. But it could hardly be true that they could not raise the question again in a suit upon a different subject matter; and the same would appear to be the case with regard to any other question concerning the state of the law. What is law for one must be law for all; and there could be no advantage in extending the doctrine of *res judicata* to such cases.

In a suit between the same parties upon another, though similar, cause of action, the parties are not precluded from contesting the constitutionality or existence and force of a statute which was not alluded to or brought to the attention of the court in the former suit. (*Boyd* v. *Alabama*, 94 U. S. 645; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Philadelphia* v. *Railway Co.*, 142 Pa. St. 484; *Dobbins et al.* v. *First National Bank*, 112 Ill. 554–561.)

In *Boyd* v. *Alabama* (94 U. S. 645) it was stated that in a former case against the same defendant, upon an indictment of a similar kind, it was held that a repealing statute was void. In that case the constitutionality of the act was not drawn in question. In the case presented it was. The Court said (p. 648):

> Courts seldom undertake, in any case, to pass upon the validity of legislation where the question is not made by the parties.

> Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then they will construe the Acts presented for consideration, define their meaning, and enforce their provisions. The fact that Acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases nor conclude the court upon the constitutionality of the Acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the Act of 1868, the court was not precluded by the previous decisions from freely considering and determining it.

In *South Ottawa* v. *Perkins* (94 U. S. 260, 267) it was held:

> * * * There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an Act of Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same State.

> And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.

Philadelphia v. *Railway Company* (142 Pa. St. 484) was an action to recover taxes under a statute of the State. In a prior suit taxes had been so collected, but the point of the constitutionality of the act had not been mooted. In this case it was; and it was claimed that the validity of the statutory provision imposing the tax was necessarily involved in the prior action and, therefore, the company was estopped. The court said (p. 493):

> The argument of the company's counsel now is that, although, in the case referred to, the point does not appear to have been made or decided, yet the constitutionality of the act of 1872 must be taken to have passed in *rem judicatam;* that the judgment in that case necessarily involved a decision that the statute imposing the tax was to that extent valid, and, although the cause of action is not the same, the city is estopped of record from relitigating that question. In support of this doctrine they cite *Beloit* v. *Morgan* (7 Wall. 619), *Aurora City* v. *West* (7 Wall. 85), *Durant* v. *Essex Co.* (7 Wall. 107), *Corcoran* v. *Canal Co.* (94 U. S. 741), *Wilson* v. *Deen* (121 U. S. 525), and *Duchess of Kingston's case* (2 Smith Lead. Cas., 8th ed., 941).
>
> Whilst the general rule declared in these authorities is undoubtedly correct, it does not

extend to estop a person from setting up the unconstitutionality of a statute when the cause of action is not the same. The former judgment is absolutely conclusive upon the parties as to the cause of action involved in it, although the statute upon which the proceedings were taken was not constitutional; that judgment can only be impeached collaterally for fraud or want of jurisdiction. It is a matter of no consequence now that the act of 1872, upon which judgment was entered for the amount of the tax, was unconstitutional and void; judgment having been entered, and no appeal taken, the subject matter of the issue in that suit is *res judicata*. The former judgment, therefore, operates as a bar to any subsequent action founded on the same demands. (Bigelow on Estop., 80–88.) In the case at bar, however, whilst the point in issue may perhaps be the same, the cause of action is different; and, although the verdict with the judgment thereon would furnish conclusive evidence of the matters in controversy upon which the verdict was rendered, and operate as a bar to further litigation thereof, it would not preclude the plaintiff in this suit from asserting the unconstitutionality of the act upon which the previous action proceeded: Bigelow on Estop., 90–103.

In *Dobbins et al.* v. *First National Bank* (112 Ill. 554, 561), which was a case involving the construction of two statutes relating to judgment and execution liens on real estate, the latter repealing the former, upon a

motion for rehearing at a subsequent term, the court, referring to the previous opinion, said (pp. 561, 563):

> The opinion then proceeded to dispose of the case upon the hypothesis it was to be governed by the provisions of the act of 1872 and not of 1845, which necessarily led to a reversal of the judgment of the Appellate Court. Had the provisions of the act of 1845, and not of 1872, been applied to the case by this court, it would of course have led to an affirmance instead of a reversal of the judgment. It follows, therefore, the only question now to be considered is, whether the trial court, in applying the act of 1845, as it must have done, committed an error for which the decree should have been reversed by the Appellate Court.
>
> * * * * *
>
> When the case was first before us for consideration our attention was not called to the sixty-sixth section, and the decision then announced was made without any reference to it; hence the conclusion reached. In the present presentation of the case that section is called to our attention, and, as already shown, it becomes an important factor in arriving at a proper conclusion in it. Giving it the effect already indicated, it follows, notwithstanding the act of 1872, the act of 1845 was continued in force as to the Dobbins judgment.

The judgment was set aside and a judgment of affirmance rendered.

Wentworth v. *Racine County* (99 Wis. 26) was a case for the recovery of fees. On the trial the record

of a former case between the same parties, for the recovery of fees, was introduced in evidence, but there was no evidence to show that the validity of the law was called in question. The court said (pp. 231, 232):

> The fact that in another case, on a different cause of action, the validity of the law in question might have been determined does not make the judgment there rendered *res adjudicata* in this case, in the absence of evidence to show that the question was actually presented to the court and decided and became a part of the judgment. The doctrine of the conclusiveness of a former adjudication does not go so far as to make such adjudication in one case necessarily binding between the same parties in another case, involving questions that might have been decided in the former. The general rule is often stated by courts and text writers that a judgment in bar, or as evidence in estoppel, is binding not only as to every question actually presented and considered and upon which the court rested its decision, but as to every point that might have been presented and decided in the case, and that is strictly accurate when applied to the cause of action in which the adjudication occurs, whether in the same or in some other case, but not when the same question is subsequently raised between the same parties on a different claim or cause of action. In the latter situation the former judgment is binding only as to matters actually presented and litigated in the former case. To make the

> rule applicable literally, there must be an identity of parties, an identity of subject matter, and an identity of cause of action. In *Cromwell* v. *Sac Co.* (94 U. S. 351), Mr. Justice Field, speaking for the court, very clearly points out the difference between the effect of a judgment in the same action, or in regard to the same cause of action, and when it is resorted to as an estoppel between the same parties upon a different claim or cause of action. Here there is no proof that the precise question upon which this case turned was presented in the former case and decided; therefore, though apparently such question might have been decided, the judgment does not affect the plaintiff's right to recover one way or the other.

In *Nesbitt* v. *Independent District*, &c. (144 U. S. 610, 621), the Court held:

> This case may be looked at in another light. The defense pleaded in the Des Moines suit was that at the time of the issue of the two bonds then disclosed there was a prior indebtedness of the district exceeding the constitutional limitation; and that defense was the one adjudged to be precluded by the recitals. Here an additional defense is, that the five bonds in suit themselves created an overissue. That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case. It is of itself a valid defense, irrespective of prior indebtedness. So we have in this case a new question not presented

> in the Des Moines suit, the existence of facts never called to the attention of the court in that case, which of themselves create a perfect defense.

The courts have thus repeatedly held that while a judgment may be relied upon as an estoppel, so that the actual judgment can not be disputed, *yet, even the question of the applicability of the law or statute which has been called to the attention of the court in the case, and which has been considered by the court, in passing upon the facts of the case, is not binding as res judicata when raised under a subsequent aspect in a second action between the same parties and in the same court.*

The defendant would further cite to the court the decision of the Supreme Court of New Jersey, reported in 27 N. J. Law 412 in the case of *Bernard* v. *City of Hoboken*. The decision of the court in that case is pertinent and applicable in this case. It was an action brought to recover salary as Chief of Police from June 20, 1856, to June 23, 1857. The appointment of Bernard, service until January 20, 1856, and his discharge on that date and payment of salary until that time were admitted. Judgment had been given in a former action for salary from January 20, 1856, until June 20, 1856. The decision of the court, in the second action brought by Bernard, is set out as follows in the syllabus:

> Where a person recovers a judgment for salary for a certain period and afterwards brings a suit for salary for a subsequent period, on the trial of the second cause the defendants

may show that the plaintiff was legally discharged from service before the commencement of the term for which he claimed salary and recovered in the first suit.

The first judgment is conclusive upon the facts only so far as that case is concerned; it does not prevent the same facts being controverted in a second case founded upon a distinct cause of action.

If the decision of the Court of Claims in the three cases which have been brought by Moser since judgment rendered in his first action is allowed to stand by this court and is not reversed, the intolerable condition set out by the Supreme Court in the *case of Perkins* would result. For, as a consequence of sustaining the position of the Court of Claims, the Act of June 29, 1906, would be a law in one case and for one party and would not be a law in another case and for another party. This is a condition which can not be justified under guise of the doctrine of estoppel.

II

The court below erred in holding that service as a cadet during the Civil War, prior to April 9, 1865, entitled Moser to be retired with the rank and pay of a rear admiral of the lower half, for the reason that Moser "had received at the date of his retirement an advance of grade," and therefore the provisions of the act of June 29, 1906, did not then and do not now apply to him

Although the court below laid down that the entire question raised by the United States as to the right of Moser to the pay of a rear admiral of the lower half could not be considered, since the entire matter

was *res judicata* under the decision in the three preceding Moser cases, yet the court proceeded in the second place to consider the question *de novo* and upon said consideration give judgment for Moser. The position of the court is based upon a misapprehension of the effect of the Act of June 29, 1906.

Moser, according to the findings of the court (42 C. Cls., pp. 87, 88) was retired in accordance with the provisions of Section 1443 of the Revised Statutes of the United States. The court found under Finding V, that when an officer was retired with increased rank under Section 11 of the Navy Personnel Act of March 3, 1899, a letter was written of which a specimen was therein set forth. The court will note that the actual letter notifying Moser of retirement did not retire him in accordance with the provisions of the act of March 3, 1899, but solely in accordance with the provisions of Section 1443 of the Revised Statutes. Moser was retired as captain and has ever since been so held on the rolls of the U. S. Navy.

The Act of June 29, 1906, prevented the retirement with rank and retired pay of one grade above that actually held by the officer at the time of retirement, if his sole service during the Civil War prior to April 9, 1865, was that of a cadet. It provided, however, that this Act should not apply to any officer who received an advance of grade at or since the date of his retirement. The judgment in the first action brought by Moser was made on January 7, 1907, six months after the passage of the Act

of June 29, 1906. The Act of June 29, 1906, clearly applied to Moser. He was during the Civil War a cadet or midshipman, having been appointed a midshipman at the Naval Academy on September 29, 1864. Moser was thus deprived at the time of the passage of this Act of the right to reckon service at the Naval Academy during the Civil War as "service during the Civil War" within the meaning of Section 11 of the Act of March 3, 1899. This is unquestionable, unless he fell under the exception contained in the proviso attached to the Act of June 29, 1906. The court below held that he fell under this proviso and that the Act did not apply to him because he "had received at the date of his retirement an advance of grade."

There is no question under the Findings of Fact made by the Court of Claims below in the first Moser case that Moser's retirement was not under the provisions of Section 11 of the Act of Congress of March 3, 1899. This is undoubtedly true as a matter of fact, since the original action of Moser and each of his subsequent actions is based on allegations that he was not so retired but was retired under the provisions of Section 1443 of the Revised Statutes with the rank he held at the time of retirement, namely, that of captain. He therefore did not receive at the date of his retirement an advance of grade, nor has any advance of grade been allowed him since by the Navy Department, as is evident by his successive actions to recover the difference in pay. The court therefore erred in its reasoning

when it said that Moser "had received at the date of his retirement an advancement of grade." What the court should have stated was, that in accordance with its decision in the first action of Moser he should have been retired with an advancement of grade to rear admiral, lower half. Therefore, the proviso of the Act of June 29, 1906, to the effect that this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement does not apply to Moser, and he falls under the general terms of the Act. The Act provides that service as a cadet should not be accounted service in the Civil War in the application of the Act of March 3, 1899. It could not, therefore, be so accounted in the case of Moser, and Moser therefore could not be held retired with the rank and retired pay of one grade above that actually held by him at the time of his retirement. He therefore could only have been retired under the law, as it actually stood at the time of the rendition of the judgment in his first action, in accordance with the provisions of Section 1443 of the Revised Statutes with the rank of captain.

The court below, in its reasoning on the merits of the case, does not attempt to controvert the reasonings of Chief Justice Peelle in the *case of Jasper* (43 C. Cls. 368), to the effect that the Act of June 29, 1906, was retroactive. The Act of June 29, 1906, Chief Justice Peelle argued (pp. 372, 373):

> controls and operates to amend, if it does not supersede, Section 11 of the Act of March 3, 1899, respecting the character of the service required during the Civil War as a basis for

> the rank and retired pay of the next higher grade. The Act goes further, and in express terms applies to those who have heretofore been, or may hereafter be retired, so that the language of the Act in express and unambiguous terms is retroactive. Indeed, the Act may be considered as the legislative construction of Section 11, and as such entitled to weight, if not conclusive * * *. His (like Moser's) application to be retired in the next higher grade under the provisions of said Section 11 of the Act of March 3, 1899, was denied by the Secretary of the Navy upon the ground that claimant's service while in the Naval Academy was not service during the Civil War. Here was a construction by the Navy Department against claimant's right to retire with the rank and three-fourths the sea pay of the next higher grade. The Act under consideration, of June 29, 1906, in effect ratified that ruling.

The reasoning on which the court below attempts upon the merits of the case, putting to one side the question of *res judicata*, to sustain a judgment in favor of Moser, is not sound and can not be followed when the acts are carefully considered.

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OCTOBER, 1924.

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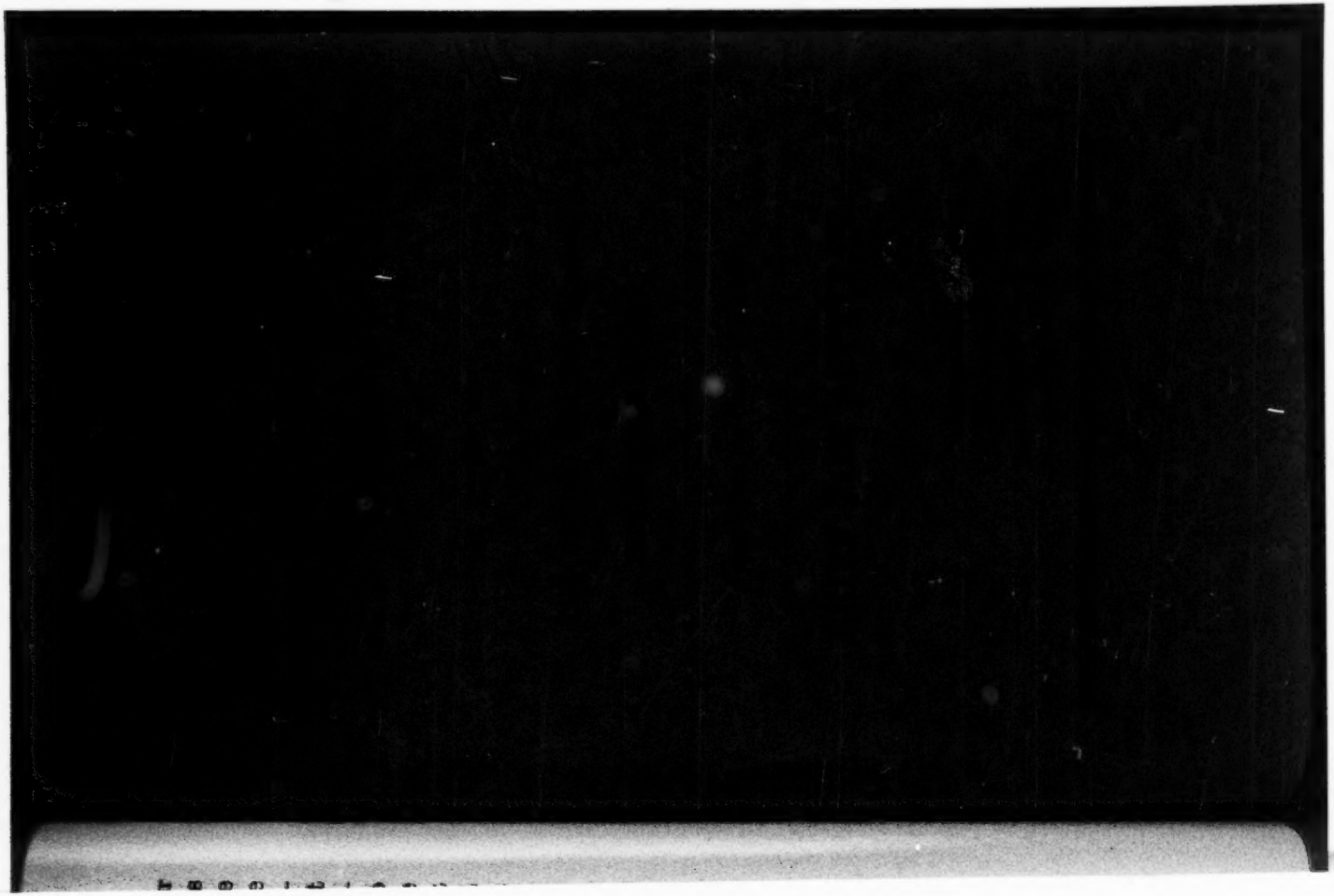

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TABLE OF CASES.

Supreme Court of the United States.

October Term, 1924.

THE UNITED STATES,
Appellant,
v.
JEFFERSON F. MOSER. } No. 99.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The facts are stated in the findings of fact and opinion of the Court of Claims (record, pp. 5–7). The claim is for the pay of a rear admiral less that of captain already received. The Court of Claims decided in favor of the claimant and the United States appealed.

The claim is based upon the Navy Personnel Act of March 3, 1899, Sec. 11 (Chap. 413, 30 Stat. 1004, 1007):

"That any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

This is the *fourth* suit of this claimant for successive installments of salary.

The history of these suits is as follows:

1. September 29, 1904, to December 31, 1906, judg-

ment entered February 4, 1907; opinion by Chief Justice Peelle, 42 C. Cls. 86. Printed as Appendix "A" to this brief (*post*, pp. 19–27). No appeal. Judgment paid.

2. January 1, 1907, to February 9, 1914, judgment entered February 9, 1914, opinion by Judge Barney, 49 C. Cls. 285. Printed as Appendix "B" to this brief (*post*, pp. 27–33). An appeal was taken from this judgment and the case docketed and the record in this court printed. Its disposition was as follows (239 U. S. 658):

"No. 159. The United States, Appellant, *v.* Jefferson F. Moser. Appeal from the Court of Claims. December 17, 1915. Dismissed on motion of Mr. Solicitor General Davis for the appellant. The Attorney General and The Solicitor General for the appellant. Mr. George A. King and Mr. William B. King for the appellee."

3. February 10, 1914, to December 11, 1917, judgment entered June 3, 1918 (53 C. Cls. 639). No appeal. Judgment paid. (Findings of fact, conclusion of law and memorandum opinion set out as exhibit to petition in this record, p. 4, top p. 5.)

4. January 1, 1918, to March 15, 1923, judgment entered March 19, 1923. Opinion by Judge Hay (record, pp. 6, 7; 58 C. Cls. 164). From this last judgment an appeal was duly taken and is the case now before the court.

II. BRIEF OF ARGUMENT.

Former Judgments Conclusive.

Three previous suits for successive installments of

salary all based upon the same grounds of fact and law settle this question as conclusively as judgments of courts can settle any human transactions.

It is contended that the Government may again litigate the question because the period involved is different from that involved in preceding cases. The issue litigated was the same in the first case and in all the later ones, that is, whether the pay properly due Moser from the date of his retirement, September 29, 1904, was that of a rear admiral or merely that of a captain. If his proper rate of pay was that of a rear admiral from September 29, 1904, it is and will continue to be the same as long as he lives. The act of August 5, 1882, chap. 391, 22 Stat. 284, 286) provides:

"Hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired."

The adjudication of the Court of Claims, therefore, that Moser was entitled to draw the pay of a rear admiral from September 29, 1904, until December 31, 1906, was conclusive in favor of his right to draw that rate of pay not only during that period but for the rest of his life.

The decisions of this court to that effect are so numerous and positive that it is unnecessary to go outside of them to establish the proposition. Some of them are cited in the opinion of Judge Barney in the second *Moser* case, 49 C. Cls. 285 (*post*, pp. 29–32).

In *United States* v. *O'Grady*, 22 Wall. 641, 647, 648, it is said:

"It is clear that the judgments of this court, rendered

on appeal from the Court of Claims, if no such power is conferred by an act of Congress, are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that court as provided in the before-mentioned act of Congress. * * *

"Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial."

In *Bissell* v. *Spring Valley Township*, 124 U. S. 225, an action on coupons attached to bonds of a municipal corporation, this court held its decision against the validity of the coupons of earlier date in a previous case between the same parties (110 U. S. 162) to be conclusive.

The principle applies equally where a decision was made by the Court of Clams, especially so, where the United States as defendant had the legal right to take an appeal to this court and either failed to exercise that right as in the first and third cases of Moser, or having taken an appeal to this court dismissed it before final determination, as in the second suit.

In *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1, the court said, pp. 48, 49:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different

cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

In *Hubbell* v. *United States*, 171 U. S. 203, 207–209, a patentee brought suit in the Court of Claims for compensation for use of his patent. The court dismissed his petition. No appeal was taken. He later sued for compensation for subsequent use. The petition was again dismissed, and this time he appealed to this court.

It was held (pp. 207, 208, 209):

"As the prior action was between the same parties, and was based in part, at least, and principally, upon the same patent, it would appear that the judgment of the court dismissing the petition would operate as a complete estoppel to the present suit, unless the proceedings subsequent to the judgment in the former suit in some way deprived that judgment of its force and effect as *res adjudicata*."

* * *

"Whether the reasons given by the Court of Claims for the dismissal of this petition are correct or not: whether, indeed, this judgment were right or wrong upon the facts presented, is of no importance here. If such judgment were based upon an erroneous view of

the claimant's patent, it was his duty to have promptly taken an appeal to this court, where the whole case would have been reopened and the error of the Court of Claims, if such there was, would have been rectified."

* * *

"But even if a somewhat different theory or state of facts were developed upon the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee cannot bring suit against an infringer upon a certain state of facts, and after a dismissal of his action, bring another suit against the same party upon the same state of facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in a subsequent action upon the same state of facts."

In *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, the question was of the exemption of a railway company from certain taxes. The railway company had in a prior suit obtained an injunction restraining the officers of the State from collecting the taxes for a certain year. In a subsequent year the successors of the same officers proceeded to attempt to collect taxes accruing for several years subsequent to those covered by the injunction in the first suit. The company applied for an injunction to restrain the officers of the State from proceeding to collect these subsequent taxes. In that case, just as here, it was contended that new grounds could be brought forward which would induce a different result for the new period. The following remarks of the court, p. 290, on this subject by Mr. Justice White, later Chief Justice, are very pertinent:

"That the issue in the case was the existence of a charter exemption from taxation in favor of the Cheraw and Darlington Railroad Company, and the consequent want of power of the State to tax the property of the railroad during the continuance of the

exemption, is obvious. And that the decree rendered in the cause established the exemption embraced in the issues is also obvious. This being true, it unquestionably follows that the decree established as to the parties and their privies the very question in issue in this proceeding."

But it is said that the court in its original judgment of February 4, 1907, sustaining the claim and giving judgment for salary for the period September 29, 1904, to December 31, 1906, was ignorant of the existence of a statute, to wit, the act of June 29, 1906 (Chap. 3590, 34 Stat. 553).

This argument may be answered in the language of this court in *Fayerweather* v. *Ritch*, 195 U. S. 276, 307:

"A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and never ought to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision."

Whatever may be true as to the state of mind of the judges as to knowledge or ignorance of this act of 1906 when their original judgment of February 4, 1907, was rendered, no such ignorance can be imputed to them when rendering the judgment in the second case, February 9, 1914 (49 C. Cls. 285, *post*, p. 27); for the act of June 29, 1906, is referred to in that decision (49 C. Cls. 290, *post*, pp. 28, 29). A second decision and abandonment by the Government of its appeal therefrom is conclusive against any argument based upon supposed ignorance of statute law on the part of the judges in deciding the first *Moser* case.

The same is true of the third case from which there was no appeal.

The question involved in this case therefore being the same as that decided in the original case (42 C. Cls. 86) from which no appeal was taken is conclusive and bars the Government from further contesting any claim of the officer whose rights are here involved based upon his right to the rank and pay of a rear admiral from the date of his retirement, September 29, 1904.

Entitled to Pay as Rear Admiral.

If, however, this court concludes to go behind the repeated judgments of the Court of Claims, the judgment is correct on the merits.

This officer entered the Naval Academy September 29, 1864. He was retired September 29, 1904, by virtue of the following provision of the Revised Statutes, Section 1443:

"When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application."

As his retirement took place on the fortieth anniversary of his entrance into the Academy, the forty years necessary for retirement had to include the Academy service. It is in accordance with the statute in existence at the time of Moser's entrance into the Academy and with the construction which this court has placed upon that very statute.

The law in force at the time Moser entered the Naval Academy was the act of July 16, 1862 (Chap. 183, 12 Stat. 583). Section 1 of this act provides:

"That the active list of line officers of the United States Navy shall be divided into nine grades, taking

rank according to the date of their commissions in each grade, as follows, viz:

First.	Rear Admirals.
Second.	Commodores.
Third.	Captains.
Fourth.	Commanders.
Fifth.	Lieutenant Commanders.
Sixth.	Lieutenants.
Seventh.	Masters.
Eighth.	Ensigns.
Ninth.	Midshipmen."

Section 11 (p. 585) provides:

"That the students at the Naval Academy shall be styled midshipmen until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according to merits."

Section 15 (p. 586), provides:

"That from and after the passage of this act the annual pay of the several ranks and grades of officers of the Navy on the active list, hereinafter named, shall be as follows:

* * * * * * * * *

"Midshipmen shall receive $500."

Construing this act this court held in *United States* v. *Baker*, 125 U. S. 646, that a midshipman at the Naval Academy was not merely in the Navy but was an officer in the Navy.

The court also held that any change made by subsequent law had no application to students already in the Academy. The court said at the conclusion of the opinion (125 U. S. 650):

"No legislation which took place after the 14th of July, 1872, can affect the question arising under the

act of 1883, as to his service as an officer in the navy prior to the 14th of July, 1872. Section 15 of the act of 1862 provided that the 'annual pay of the several ranks and grades of officers of the navy on the active list,' thereinafter named, comprehending the nine grades mentioned in the first section of the same act, should be as thereinafter specified in the 15th section, and the last provision was this: 'Midshipmen shall receive $500.'

"It is impossible not to conclude that the claimant continued to be, after the passage of the act of 1870, as he was prior to its passage, an officer of the navy, on the active list, and serving as such an officer, by virtue of his having been appointed a midshipman and continuing to be a student in the naval academy, even though he might have been properly styled after the passage of the act of 1870, a cadet midshipman."

In *United States* v. *Cook*, 128 U. S. 254, reaffirmed the *Baker* case (p. 256):

"That a midshipman is an officer has been understood ever since there was a navy. He is not one of the common seaman. His name indicates a middle position, between that of a superior officer and that of the common seaman. Harris, in the early part of last century, and Johnson in the middle of it, defined 'midshipmen' as 'officers aboard a ship.'"

Moser was included within the description "who served during the civil war." The civil war was flagrant on September 29, 1864, and so continued for a long time thereafter. As to how long it continued see *United States* v. *Anderson*, 9 Wall. 56, 71; *The Protector*, 12 Wall. 700.

Provision for Higher Grade Self-Executing.

The provision of Sec. 11 of the Navy Personnel Act of March 3, 1899 (*ante*, p. 7), was self-executing. It

required no action by any board or officer to give Moser a higher rank on the retired list. It says that any officer having the requisite qualifications "*shall*, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade." Rank is given an officer on the retired list not as a new office but for purposes of honor and pay.

The law in force at the date of this officer's retirement did not provide for any commission to be issued to the officer thus retired in the next higher grade. None was given Moser (Finding V, original *Moser* case, 42 C. Cls. 88, *post*, p. 20).

In *Wood* v. *United States*, 107 U. S. 414, this court considered the rank of an Army officer on the retired list (pp. 416, 417):

"The Court of Claims dismissed the petition on the merits. The view of that court was that, under the statutes of the United States in reference to the army, the office of an officer of the army and his rank are not necessarily identical; that the office has a rank attached to it, expressed by its title, when no other rank is conferred on the officer; that the office remaining the same, the officer may have a different rank conferred on him, as a title of distinction, to fix his relative position with reference to other officers as to privilege, precedence, or command, or to determine his pay; that, by section 1274 of the Revised Statutes, the pay of officers on the retired list of the army is determined by the rank upon which they are retired; that, by section 1094, the officers of the army on the retired list are a part of the army of the United States, and therefore, no one can be upon that list who is not an officer appointed in the manner required by section 2 of Art. 2 of the Constitution; that an officer of any grade, on the active list, thus appointed, may be retired with a different rank from that which belongs to his office, when Congress so provides; that this is not to appoint him to a new and different office, but is to transfer him to the retired list,

and to change his rank, while he holds the same office; and that in connection with this change of rank his pay may be changed. These views appear to us to be sound."

The opinion concludes (foot p. 417): "The pay of retired officers is a matter entirely within the control of Congress, and so is their rank."

The only difference between the *Wood* case and this is that there the officer's rank, and in consequence his pay, were *reduced* by a general provision of law, while in the case at bar they were *raised.*

The present act is of the same character as the statute of New York for the retirement of policemen. That act was construed by the Court of Appeals of New York as self-executing. That court said in *Fitzpatrick* v. *Greene,* 181 N. Y. 308, 309, 310:

"By section 355 of the present charter of the city of New York an honorably discharged soldier or sailor from the Army or Navy of the United States in the late civil war 'who has performed duty on said police force for a period of twenty years or upwards, upon his own application in writing, * * * providing there are no charges against him pending, *must* be relieved and dismissed from said force and service by the department and placed on the rolls of the police pension fund and awarded and granted, to be paid from said pension fund, an annual pension during his lifetime of a sum not less than one-half of the full salary or compensation of such member so retired.'

"It will be seen that this statute permits a member of the police force to retire from the service, providing he is a veteran and has served twenty years. That the relator was such a veteran and had served twenty years is admitted in the return to the writ of *certiorari,* and conceded upon the arguments. It will be seen also, that this statute executed itself, in the sense that when the necessary facts exist the retirement is accomplished

by the policeman's application in writing. In other words, when the necessary conditions actually exist the retirement is accomplished by the policeman's application without any action upon the part of any other body."

Effect of Act June 29, 1906.

But it is claimed on behalf of the Government that Moser's right to the higher rank on his retirement September 29, 1904, was taken away by the act of June 29, 1906 (Chap. 3590, 34 Stat. 553, 554) (record, p. 7; brief for United States, pp. 6, 7).

If his retirement in 1904 gave him without any act on the part of the executive officers of the United States the higher rank and pay of a rear admiral, certainly there was no intent in the passage of the act of June 29, 1906, to take it away from him.

The words of past tense in the act of 1906 were intended to reach an altogether different class of cases. The provisions of the 11th section of the personnel act of 1899 conferred no benefit upon any officer of the Navy retired before its passage. They looked entirely to future retirements. Before the passage of that act, however, large numbers of officers with civil war service had already been retired. Indeed, there were cases where officers who had served in two wars, the civil war and the war of 1898 with Spain, had been retired before March 3, 1899, and received no benefit of that act.

This condition was felt to be a hardship and an injustice.

Reference to any officer of the Navy "who has heretofore been retired," etc., was intended to advance on the retired list those who had been retired before 1899. In the report of the Senate Committee on this very

bill (Senate Report 3921, 59th Congress, 1st Session, p. 5) in a letter from the Navy Department on this subject appears the heading, "Retired Officers (Those Retired Prior to Personnel Act)."

As the court below points out in its opinion (Record, two-thirds down p. 7) there is a proviso to the act of 1906:

"That this act shall not apply to any officer who received an advance in grade at or since the date of his retirement," etc.

The advance in grade under Section 11 of the act of 1899 was the only advance existing at that date to which this proviso could possibly apply. A retirement accompanied by an advance in grade under the act of 1899, as in this case, was thus the very right that was saved by the proviso of the act of 1906.

Retroactive Construction not Favored.

A statute should never be construed as retroactive wherever its terms can be satisfied by giving it a prospective construction.

The language of past tense in the statute can be fully satisfied by giving the benefit of the act to those who had previously been retired without getting an advance in grade. It did not take away from those already retired the higher grade already attained by them upon retirement.

In the *Twenty Per Cent Cases*, 20 Wall. 179, 187, 188, this court said:

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or

with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.

"Such a law, if passed by a State, and construed to have the effect claimed for it in this case by the appellants, would be unconstitutional and void; but it is not necessary to discuss any such proposition in this case, as there is not a word in the repealing act to support the conclusion that Congress intended to rescind any antecedent contract, or to enact any bar to the right of recovery in such cases where the service had been faithfully performed before the repealing act was passed."

In *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131, the court said (p. 134):

"After the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement."

In *White* v. *United States*, 191 U. S. 545, this court construed a provision of the Personnel Act of 1899, "that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall on the date of appointment be credited for computing their pay with five years' service."

It was held that that act did not operate to grant

any additional pay for past services, but that the terms of past tense could be fully satisfied by giving the increased pay in the future wherever such would be the effect of giving a credit of five years on the date of an appointment made before as well as after the passage of the act.

Effect of Act March 3, 1909.

But there is a still later act which sets at rest all question as to the intent of Congress. Act of March 3, 1909 (Chap. 255, 35 Stat. 753):

"The provisions of the Act approved June 29, 1906, entitled 'An Act making appropriations for the naval service for the fiscal year ending June 30, 1907, and for other purposes,' providing for the retirement in the next higher grade of officers of the navy who served during the civil war, shall not operate to deprive any officer of the navy who has been, or may be, retired, since the passage of that Act, of the right to increased rank and pay to which, but for the passage of said Act, he would have been entitled."

Judge Barney in giving the opinion of the Court of Claims in the second *Moser* case, said (49 C. Cls. p. 294 (*post*, p. 33):

"It is argued that it was the evident intention of Congress by the latter act to take away all retroactive effect which might otherwise be given to the act of June 29, 1906 (34 Stat. 554), and that any other construction would lead to the absurdity of making the act of 1906 take away the right of any officer who retired before its passage, but relieving from its operation those who have retired since. And numerous authorities from the Supreme Court are cited to the proposition that a statute should not be given a retrospective effect unless the words used are so clear and imperative as to admit of no other construction. This point is not con-

sidered or decided, as the first point decided disposes of the case in favor of the claimant."

The intent of the passage of the act of 1909 is clear. It is to prevent the act of 1906 having any such retroactive effect as to prejudice the right that any officer of the Navy would otherwise have to the next higher grade upon retirement.

True, it provides that the act of 1906 "shall not operate to deprive any officer who has been, or may be, retired *since* the passage of that act of the right to increased rank and pay to which, but for the passage of said act, he would have been entitled."

It does not in terms say that officers retired *before* the passage of the act of 1906 shall not be deprived by that act of the right to increased rank and pay. Surely, however, if the act of 1906 was not to take away a right from any officer *thereafter* retired, it did not take away such right from those who had *theretofore* been retired.

An act declaratory of the construction of a previous act which says that the previous one shall not prejudice rights accruing after its passage implies *a fortiori* that the act can not prejudice rights accruing *before* the previous act was passed. Thus the construction placed in 1909 by Congress upon its own previous legislation of 1906 demonstrates that there was no intention to take away from any officer previously retired any of the rights which would be his but for the passage of the act of 1906.

Conclusion.

This controversy has now been going on for twenty years. The government has had three previous oppor-

tunities to correct any possible error made by the court below by appeal to this court. No appeal was taken in the first action, where the original question of the right to this pay could have been settled. An appeal was taken in the second action, where the question of the conclusiveness of the first decision, and perhaps also the effect of the acts of 1906 and 1909, could have been settled. Instead of presenting these questions to this court the government dismissed its appeal. The third suit was decided on the basis of the two previous ones. That, too, passed without appeal. A belated appeal from the fourth judgment seeks to set at naught all that has gone before. The action of the Navy Department in refusing to follow repeated decisions of the Court of Claims is treated in the brief by the United States (foot p. 26) as having some force against his rights. Rather should it be treated as an unwarrantable disregard of judicial action which should have met with ready obedidence. *Smith* v. *Jackson*, 246 U. S. 388.

It is time that this officer in his old age should no longer be required to keep on suing in the Court of Claims, but should have the honors and pay which Congress granted to officers in his situation, and which have been too long withheld.

The judgment of the Court of Claims should be affirmed.

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APPENDIX A.

[From 42 C. Cls. 86–94.]

JEFFERSON F. MOSER *v.* THE UNITED STATES.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

FINDINGS OF FACT.

I. The claimant entered the United States naval service as midshipman on September 29, 1864, and has served continuously in the Navy since that date.

II. On August 10, 1903, he was promoted to the grade of captain, and on September 29, 1904, while serving in that grade, he was placed on the retired list after forty years' service in accordance with section 1443 of the Revised Statutes. The letter notifying him of his retirement is as follows:

"NAVY DEPARTMENT,
"*Washington, May 17, 1904.*

"Sir: The President of the United States having approved your application for retirement, you are, by his direction, transferred to the retired list of officers of the Navy from September 29, 1904, in accordance with the provisions of section 1443 of the Revised Statutes of the United States.

Very respectfully,
"CHAS. H. DARLING,
"*Acting Secretary.*

"CAPTAIN JEFFERSON F. MOSER, U. S. NAVY,
"*Commandant Naval Training Station,*
"*San Francisco, Cal.*"

III. During his entire service his record was creditable, as reported by the Secretary of the Navy, about which there is no controversy.

IV. When placed on the retired list, he was not recognized by the Navy Department as entitled to the rank and pay of the next higher grade and has been paid as captain only.

V. When officers of the Navy are retired with increased rank under section 11 of the navy personnel act of March 3, 1899 (30 Stat. L. 1007), no commission in the higher rank in which they are retired is given them, but a letter is written, of which the following is a specimen:

"NAVY DEPARTMENT,
"*Washington*, ——.

"Sir: The President having approved your application for retirement, you have been, by his direction, transferred to the retired list of officers of the Navy from the 11th day of January, 1905, in accordance with the provisions of section 1443 of the Revised Statutes, and with the rank and three-fourths of the sea pay of a rear-admiral, in accordance with the provisions of section 11 of the act of Congress approved March 3, 1899, commonly known as the 'Navy personnel act.'

"Very respectfully,"

VI. Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the claimant's service as a midshipman in the Naval Academy from September 29, 1864, to the close of the war of the rebellion was creditable service "during the civil war."

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment in the sum of $2,537.50.

Peelle, Ch. J., delivered the opinion of the court.

September 29, 1864, the claimant was appointed a midshipman at the Naval Academy, and served there continuously until after the close of the late civil war. On August 10, 1903, he was promoted to the grade of captain, and on September 29, 1904, he was, at his own request—after forty years' service—placed on the retired list by the President under the provisions of Revised Statutes, section 1443.

Section 11 of the act of March 3, 1899 (30 Stat. L. 1007), known as the "Navy personnel act," provides:

"That any officer of the Navy, with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

The claimant contends—and that is the whole case—that he was entitled to be "retired with the rank and three-fourths the sea pay of the next higher grade"; that is to say, with the rank and three-fourths the sea pay of a "rear-admiral embraced in the nine lower numbers of that grade," as provided by section 7 of said personnel act.

To entitle the claimant to recover he must show, not only that he was an officer of the Navy with a creditable record, but that his service as a midshipman at the Naval Academy was service "during the civil war," within the meaning of the act.

The evident purpose of that statute was upon retirement to give to those officers of the Navy with creditable records, "who served during the civil war," credit by way of advancement to the rank and three-fourths the sea pay of the next higher grade.

If the claimant were seeking to recover the salary of an office to which he had not been appointed, clearly he could not recover, as the power of appointment to office in the Navy resides in the executive branch of the Government; and while the office carries with it the rank and salary pertaining to that grade, it does not follow that one may not be entitled to the rank without holding the office; that is to say, the name of the office is also a designation of rank, which latter may be changed by Congress without encroaching upon the executive branch of the Government. This was the ruling of the court in the case of *Wood* (15 C. Cls. 151, 160), where the court, respecting the power of Congress to change the rank of an officer in the Army, said:

"By Revised Statutes, section 1094, officers on the retired list of the Army compose part of the Army of the

United States, and therefore no one can be upon that list who is not an officer appointed as required by the Constitution, article 2, section 2. But being such officer, thus appointed, of any grade on the active list, he may be retired with a rank higher or lower than that which belongs to his office whenever Congress sees fit so to provide. Congress can not appoint him to a new and different office, because the Constitution vests the appointing power in the President with the advice of the Senate, or in certain cases in the President alone, the heads of the Executive Departments, or the courts of law; but Congress may transfer him to the retired list, and may change his rank and pay at any time, without coming in conflict with that provision of the Constitution."

That case was, on appeal to the Supreme Court affirmed (107 U. S. 414). The court, referring to the ruling of this court, said: 'These views appear to us to be sound. General Wood, holding the office of a colonel of cavalry in the Army, his retirement with the rank of major-general, under the act of 1868, did not confer on him the office of major-general. He remained in the office of colonel of cavalry, and acquired a higher rank and higher pay as a retired officer. Such rank not being an office, Congress could change his rank, and with it his pay, as it did by the act of 1875. * * * The pay of retired officers is a matter entirely within the control of Congress, and so is their rank." *Leopold* v. *United States* (18 C. Cls. 546); *Hawkins* v. *United States* (40 C. Cls. 110); *United States* v. *Redgrave* (116 U. S. 474), affirming the judgment of this court (20 C. Cls. 226). See also 22 Op. Atty. Gen. 433.

Those decisions are in harmony with Revised Statutes, section 1558, respecting the pay of officers of the Navy on the retired list. Therein it is in substance provided that upon retirement the pay of all such officers shall be seventy-five per centum of the sea pay, not of the office held by them, but of the "grade or rank which they held, respectively, at the time of their retirement." Officers thus retired remain subject to the rules and articles for the government of the Navy,

as well as to trial by court-martial. (Revised Statutes, section 1457.)

If, therefore, the claimant was entitled to "be retired with the rank and three-fourths the sea pay of the next higher grade," the court may render judgment in his favor without encroaching on the executive branch of the Government.

Was the claimant's service as a midshipman at the Naval Academy such service as entitled him to be retired with the rank and three-fourths the sea pay of the next higher grade?

The claimant was appointed to the Naval Academy September 29, 1864, and forty years thereafter was, on his own application, retired by the President under Revised Statutes, section 1443, which provides:

"When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application."

The claimant while at the Naval Academy was, therefore, recognized by the executive department of the Government as an "officer of the Navy * * * in the service of the United States," otherwise he would not have had forty years' service to his credit when he retired.

By the act of July 16, 1862 (12 Stat. L. 583) now Revised Statutes, section 1362, dividing the active list of the line officers of the Navy into nine grades, midshipmen were designated ninth. That law was in force when the claimant was appointed at the Naval Academy and continued in force until after the civil war and until the act of July 15, 1870 (16 Stat. L. 321), when the title of midshipman was changed to cadet-midshipman, but such change of title did not affect the character of the service at the Academy, though that is not material here.

In the case of *Baker* (23 C. Cls. 181) the question involved was whether the claimant, while pursuing his studies at the Naval Academy, was an officer or an enlisted man in the Navy, and whether, if an officer, he

was entitled to be credited with such period of study in the calculation of his longevity pay, and the court held that he was, and that case was, on appeal, affirmed (125 U. S. 646). The latter court, among other things, said:

"The single question involved is whether the claimant, while he was a midshipman, was serving as an officer or enlisted man in the Navy, within the meaning of the act of 1883. The contention on the part of the United States is that the claimant, whilst a student at the Naval Academy, did not, in the sense of the act of 1883, serve either as an officer or an enlisted man; and that, in that view, it is immaterial whether as a student he is or is not to be regarded as an officer of the Navy. It is denied by the United States that the entry of a pupil into the Academy is his entry into the naval service, and that the period of his pupilage is actual service within the meaning of the act of 1883; and it is argued that he does not enter into actual service until he is appointed either in the line of the Navy, the Marine Corps, or the Engineer Corps; that as a student he does not serve, but is preparing to serve; that he does not render service to the Government, but is receiving favors from it; that he can only commence service after his graduation, such service depending upon his graduating merit; and that the compensation of $500 a year given to him is not a payment for service rendered, but is a gratuity and an allowance made for him for his support in his preparation for service to be rendered.

"When the claimant was appointed a midshipman in the Navy, on the 30th of September, 1867, the act of July 16, 1862, c. 183 (12 Stat. L. 583), was in force. The first section of that act divides the active list of line officers of the Navy into nine grades, the first of which is 'rear-admirals,' the eighth of which is 'ensigns,' and the ninth of which is 'midshipmen.' The eleventh section of that act provides that the students at the Naval Academy shall be styled midshipmen, until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according

to merit. Thus section 1 of that act creates the grade of midshipman as one of the nine grades of the active list of line officers of the Navy, and section 11 declares that the students at the Naval Academy shall be styled midshipmen. * * *

"It is impossible not to conclude that the claimant continued to be, after the passage of the act of 1870, as he was prior to its passage, an officer of the Navy, on the active list, and serving as such an officer, by virtue of his having been appointed a midshipman and continuing to be a student in the Naval Academy, even though he might have been properly styled, after the passage of the act of 1870, a cadet midshipman."

We must, therefore, conclude that the claimant, while serving as an undergraduate in the Naval Academy, as a midshipman, was an officer of the Navy in the service of the United States, and as such was, under the articles for the government of the Navy, subject to court-martial, and was also subject to the orders of his superior officer the same as other officers of the Navy.

In the recent case of *Jasper* (38 C. Cls. 202) the court in substance held that while a midshipman in the Naval Academy was an officer of the Navy while pursuing his studies there, and as such officer was entitled to have such service reckoned in calculating his longevity pay, yet he was not an officer of the Navy "who served during the civil war" within the intent of the navy personnel act allowing him to retire with the rank and pay of the next higher grade. But on claimant's motion therefor a new trial was allowed, on the theory that midshipmen at the Naval Academy were liable to be and were actually called into the service during the civil war. (*Jasper case*, 40 C. Cls. 76.)

Though the claimant was subject to be ordered to active duty on board ship or otherwise during his term in the Naval Academy, it does not appear that he was so ordered or that he performed any service other than that required of him as a student at the academy. That he was not so ordered into active service, was, of course, not his fault.

Shall, then, the failure of his superior officers to order him into active service during that period deprive him of the benefit of the act? If so, then active service *in the civil war* becomes the test of an officer's right to "be retired with the rank and three-fourths the sea pay of the next higher grade." But to so hold we must import into the section language that will harmonize with that construction. That is to say, we must construe the section as though the language were, that any officer of the Navy, with a creditable record, who served *actively* during the civil war, or who had active service during the civil war, shall be entitled to the benefit of the act. To so hold would exclude from the benefit of the act all officers of the Navy who from no fault of their own saw no active service in or during the civil war.

Suppose prior to the civil war an officer of the Navy had been assigned to duty at the American Legation in London, and because of his efficiency there, or for other reasons, he had been kept there during the whole period of the civil war, would it be contended that he, a recognized officer of the Navy, with a creditable record, did not serve "during the civil war" because he had no active service therein? We think not, and since the claimant was an officer of the Navy with a creditable record on "the active list of the line officers of the Navy" during the civil war, by virtue of the act of 1862 (*supra*), we must hold that his service as a midshipman at the Naval Academy from the date of his appointment thereto until the close of the rebellion was service "during the civil war," within the intent and meaning of section 11 of said navy personnel act, and he was therefore entitled to have been retired with the rank and three-fourths the sea pay of the next higher grade, i. e., with the rank and three-fourths the sea pay of a "rear-admiral embraced in the nine lower numbers of that grade," being three-fourths the old Navy sea pay of a rear-admiral as preserved by section 13 of the Navy Personnel Act, as amended June 7, 1900 (31 Stat. L. 697), as decided by this court in *Terry* v. *United States* (39 C. Cls. 353), followed by the Controller in Barclay's

and Foster's cases (11 Controller's Decisions, 347, 645).

The judgment will be suspended until the computation of the amount due, upon the basis of this opinion, has been ascertained by the accounting officers, after which judgment is ordered to be entered.

On February 4, 1907, judgment was entered in favor of the claimant for $2,537.50.

APPENDIX B.

[From 49 C. Cls. 285, 289–294.]

JEFFERSON F. MOSER *v.* THE UNITED STATES.

BARNEY, *Judge*, delivered the opinion of the court:

The claimant is a retired naval officer and brings this suit to recover the difference between the retired pay of a rear admiral of the nine lower numbers, to which he claims he is entitled, and that of a captain, the pay actually allowed him for the period from January 1, 1907, to March 6, 1912.

The claimant was appointed to the Naval Academy September 29, 1864, remained in the naval service, and passed through the several grades to the rank of captain, which he attained August 10, 1903. On September 29, 1904, upon his own application, he was retired in accordance with the provisions of section 1443 of the Revised Statutes, and following this retirement he was paid three-fourths of the sea pay of a captain in the Navy. On September 13, 1905, he brought suit in this court to recover the difference between the retired pay of a rear admiral of the nine lower numbers and the pay thus allowed him, claiming that he should have been retired with the latter rank pursuant to section 11 of the act of March 3, 1899, 30 Stat. 1007, which is as follows:

"That any officer of the Navy with a creditable record, who served during the Civil War, shall, when

retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

In that suit this court held that service as a cadet at the Naval Academy constituted service during the Civil War within the meaning of this statute, and that the claimant should have been retired with the rank and three-fourths of the sea pay of the grade next above that held by him on the date of his retirement, i. e., the rank and pay of a rear admiral of the nine lower numbers. 42 C. Cls. 86. This decision followed the doctrine laid down in the case of *Baker* v. *United States*, 125 U. S. 646. The judgment in the former *Moser case* was entered in this court February 4, 1907, for the sum of $2,537.50, that being the difference between the claimant's retired pay as a rear admiral of the nine lower numbers and the retired pay of a captain which had been allowed him, reckoned from the date of his retirement to December 31, 1906. No appeal was ever taken in that case, and the judgment was paid.

At the time this former *Moser case* was presented to the court neither one of the parties called the attention of the court to the following provision of the act of June 29, 1906, 34 Stat., 554:

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the Regular or Volunteer forces during the Civil War prior to April 9, 1865, otherwise than as a cadet, and whose name is borne on the Official Register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the

retired list by virtue of the provisions of a special act of Congress."

In fact the court and the attorneys engaged in that case were at the time ignorant of the existence of that statute.

A little more than a year after the trial of the former *Moser case* the case of *Jasper* v. *United States*, 43 C. Cls., 368, came before this court, in which the same question was involved, and in that case attention was called to the act of June 29, 1906. It was considered and construed and this court decided that it deprived Jasper of the right to reckon service at the Naval Academy during the Civil War as "service during the Civil War" within the meaning of section 11 of the act of March 3, 1899, *supra*. This reversed the ruling of the court in the former *Moser case*, and the court remarked in its opinion that if the provisions of the act of June 29, 1906, had been called to the attention of the court the result would have been the same in both cases.

It will thus be seen that the question is presented to the court in this case whether the decision and judgment in the former *Moser case*, 42 C. Cls. 86, is *res judicata* as to the claimant's status as to pay as a retired naval officer.

The underlying principles upon which the rule of *res judicata* is based are so familiar that it is needless to discuss them. They are well stated by Mr. Justice Day in *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510, 511:

"When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself; was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights

of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such cases nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony."

We think one of the definitions of the rule of *res judicata* given in *Van Fleet's Former Adjudications* is particularly applicable to this case: "A final judgment on the merits determining any issue of law or fact, after a contest over it, forever sets it at rest, and fixes it as a fact or as the law in any other litigation between the parties." Id., vol. 1, sec. 1.

It is urged, however, by the defendants that this suit is based upon a different claim or demand from the one litigated in the former *Moser case;* that is to say, that the former *Moser case* was a claim for pay for the period from September 30, 1904, to December 31, 1906, while the demand in this case is for pay since December 31, 1906. We think that is too narrow a view of the issue in the former *Moser case.* It was not denied in that case that Moser was entitled to *some* pay during the period involved; in fact he had already been paid for the period at a certain rate. The real question at issue was the rate of pay to which Moser was entitled to receive, not only from September 30, 1904, to December 31, 1906, but as long as he might live. Stated in another way the issue in that case was the status as to pay of the claimant. The facts in the case were undisputed, and this issue was one of law alone.

If we admit that this court was in error in the former

Moser case in the construction of the statute then in force as to the retired pay of officers (and that is, at least, somewhat doubtful), this error as affecting the rule of *res judicata* would not differ from an error as to any rule of the common law. Where the law of a case is settled by adjudication it is settled as to statute law as well as the common law. When a suit has been tried in a court of competent jurisdiction it is a legal presumption amounting to a conclusion that every issue of law involved in it has been tried and decided.

True, as already stated, the attention of the court was not called to the act of June 29, 1906, *supra;* but it sometimes happens in the trial of cases that if the attention of the court had been called to some decisions and authorities as to the common law which had been overlooked the decision would have been different. In other words, the law of a case may sometimes be settled wrong, but where it is once settled it is none the less final. The act of June 29, 1906, was before the court when the *Jasper case* was tried, and it was urged by able counsel that it did not affect the rights of the claimant. This court decided otherwise, and as this court is not infallible, we may have been wrong in the *Jasper case* and right in the former *Moser case.* We could not have been right in both cases, but right or wrong we made the law in those two cases. This circumstance is noted as showing the reason for the rule of *res adjudicata.*

In the case of *Gardner* v. *Buckbee,* 3 Cowen, 120, where A sued B upon a promissory note, and B pleaded the general issue with notice that the note was given upon the fraudulent sale of a vessel by A to B, which was the question upon the trial, and the verdict was for the defendant, and afterwards A sued B upon another note given upon the same purchase, it was held that upon the trial of the second cause the record and proceedings in the first was conclusive of the fraud and were a conclusive bar to the second action.

Freeman v. *Barnum,* 131 California, 386, was a proceeding by mandamus to compel an auditor to draw a warrant in favor of the petitioner for certain install-

ments of salary alleged to be due him as assistant district attorney of the county, and it was held that a former judgment upon mandamus compelling the auditor to draw such a warrant in favor of the same officer and adjudging as insufficient a defense that the office had been terminated by a rescission of the order authorizing his appointment was an estoppel as to such defense in the latter action.

New Orleans v. *Citizens Bank*, 167 U. S. 371, was a proceeding involving the power of the city of New Orleans to impose certain taxes upon the defendant, and it was held that a former judgment by a court of competent jurisdiction in a suit between the same parties, involving the same facts and circumstances, was a *res judicata* and conclusive upon the parties.

The following is an extract from the opinion rendered by Chief Justice White:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principles of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear." (Id., 396.)

Many other cases to the same general principle might be cited, but it is believed those above cited are decisive of this case.

We are constrained to hold that the issue tried and determined in the former *Moser case*, 42 C. Cls. 86, was identical with the one in the case at bar, and is conclu-

sive upon the parties and estops the defendants from again litigating the same question in this suit.

It is contended by the claimant that even if it is admitted the judgment in the former *Moser case* is not conclusive upon the parties in this suit, he is entitled to recover herein under a provision of the act of March 3, 1909, 35 Stat., 753, which is as follows:

"The provisions of the act approved June 29th, 1906, entitled 'An act making appropriations for the naval service for the fiscal year ending June 30, 1907, and for other purposes,' providing for the retirement in the next higher grade of officers of the Navy who served during the Civil War, shall not operate to deprive any officer of the Navy who has been, or may be, retired, since the passage of that act, of the right to increased rank and pay to which, but for the passage of said act, he would have been entitled."

It is argued that it was the evident intention of Congress by the later act to take away all retroactive effect which might otherwise be given to the act of June 29, 1906, 34 Stat. 554, and that any other construction would lead to the absurdity of making the act of 1906 take away the right of any officer who retired before its passage, but relieving from its operation those who have retired since. And numerous authorities from the Supreme Court are cited to the proposition that a statute should not be given a retrospective effect unless the words used are so clear and imperative as to admit of no other construction. This point is not considered or decided, as the first point decided disposes of the case in favor of the claimant.

Judgment for claimant for $5,843.77.